APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Bannerjee.

KALUP NATH SINGH (PLAINTIFF) *v.* LALA RAMDEIN LAL AND OTHERS (DEFENDANTS).* 1888 *December 7.*

Partition—Suit to stay Partition by Collector—Beng. Act VIII of 1876, *ss.* 267 105—*Specific Relief Act (I of* 1877), *s.* 42—*Declaration of specific rights —Limitation.*

A person bringing a suit under s. 42 of the Specific Relief Act to stay a partition directed by the Collector under Beng. Act VIII of 1876, on the ground that a private partition has already been come to, must prove not only that there has been a private partition, but also that, under that partition, he is entitled to, and was in possession of, in severalty some specific portion of the property again sought to be partitioned by the Collector ; and such person is entitled to no declaration effecting the rights of other shares in the parent estate. *Khoobun* v. *Wooma Churn Singh* (1) distinguished.

Semble.—Section 26 of Beng. Act VIII of 1876 does not bar the right to bring an action, but merely limits the effect of the decree unless the action is brought within a certain time.

THIS was a suit under s. 42 of the Specific Relief Act, brought on the 25th September 1886, for the purpose of staying certain *butwara* proceedings directed to be effected by an order, of the Board of Revenue, dated the 8th April 1886, which order confirming the order of the Collector, decided that there was no sufficient evidence of a private partition having taken place regarding the land in suit. The plaintiffs alleged that he was one of the proprietors of Mehal Soa, which consisted of eight villages, entered as an entire estate in the Collector's *towzi ;* that the whole of this mehal had been privately partitioned between the several co-sharers, and that therefore no further partition proceeding could be had under Beng. Act VIII of 1876.

The defendants contended that the mehal had not been privately partitioned, and that the question was *res judicata.*

* Appeal from Appellate Decree No. 554 of 1888, against the decree of H. F. Mathews, Esq., Judge of Shahabad, dated the 15th of December 1887, reversing the decree of Baboo Koilash Chunder Mukerjee, Subordinate Judge of that district, dated the 7th June 1887.

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The Subordinate Judge found that there had been a private partition, and that a certain portion of the mehal, which was in jungle, was joint; he therefore held that the *butwara* proceeding under the Act should be stayed, save as regards a portion of the estate which was under jungle.

The defendants appealed to the District Judge, contending for the first time that the suit was barred by limitation under s. 26 of Beng. Act VIII of 1876; the District Judge held that the suit was so barred, the plaint not having been filed till more than five months after the Board's order for *butwara*, and the decree of the lower Court being of such a nature as to affect the progress of the proceedings taken under the Act; he therefore reversed the decision of the Subordinate Judge.

The plaintiff appealed to the High Court.

Baboo *Abinash Chunder Banerjee*, for the appellant, contended that s. 26 of Beng. Act VIII of 1876 did not apply, and that private partition had been sufficiently proved, citing *Khoobun* v. *Wooma Churn Singh* (1).

Baboo *Mohesh Chunder Chowdhry* for the respondents.

The judgment of the Court (PETHERAM, C.J., and BANERJEE, J.) was delivered by

PETHERAM, C.J.—This is a suit brought by the plaintiff against the defendants to obtain certain declarations, and the facts of the case are, that the plaintiff and the defendants are co-sharers in a mehal called Mehal Soa, and that the defendants had taken proceedings before the Collector for the purpose of having that mehal partitioned amongst the co-sharers. The plaintiff objects to these proceedings on the ground that the mehal in question has already been partitioned, and he has accordingly brought this suit.

There are six prayers to the plaint. They are: (*a*) that it be declared that the lands of Mehal Soa have, from before, been separately in possession of the puttidars according to private partition; (*b*) that it be declared that the defendants, the applicants for the *butwara*, have no right to get it partitioned by the Collectorate; (*c*) that the orders of the Revenue Court,

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the last of which was passed by the Board of Revenue on the 8th April, 1886, be set aside; (*d*) that a rubocar be sent to the Collectorate of this district for stopping the *butwara* proceedings till the disposal of this case by the Court; (*e*) that such other relief be granted by the Court as the plaintiff may be entitled to; and (*f*) that costs be awarded against the contending defendants.

The Subordinate Judge who tried the case has practically granted all the prayers of the plaint, and the District Judge before whom the matter came on appeal has reversed his decree and has dismissed the suit, on the ground that the whole claim is barred by s. 26 of Beng. Act VIII of 1876.

It is not necessary for us to say anything in this case with reference to any of the prayers in the plaint, except prayer (*a*), because they are practically abandoned, and with reference to (*a*) the judgment of the Subordinate Judge is a short one. With reference to that prayer, he declares that there is a private partition in the mehal.

As I said just now the District Judge has dismissed the suit on the ground that it is barred by limitation by s. 26. As to that I think it is enough for us to say that we do not agree with the Judge in his view of the section. That section does not, in my opinion, bar the right to bring an action; it only limits the effect of the decree, unless the action is brought within a certain time. But, although we do not agree with the Judge in the reasons for which he dismissed the suit, we think he was right in dismissing it.

As I said just now, the only prayer of the plaint which is pressed upon us is the part which declares that there has been a private partition among the co-sharers in the mehal. That being so, it follows that this is a suit brought under the provisions of s. 42 of the Specific Relief Act. That section states: "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief."

In this case the plaintiff has brought this suit for the purpose of having it declared that there has been this

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partition, and that by this partition he is entitled to some portion of the property in severalty; and if what he had done had been to bring a suit to declare that he was entitled in severalty to some specific portion of property, then no doubt he would have been entitled to that relief if he proved it. But then he would have had to prove much more than he has proved in this case. He would have had to prove that there had been a private partition, and he would have had to prove that under that partition he was entitled to, and was in possession of, some specific area within this mehal. But he is not entitled, I apprehend, to any declaration unless it affects his right to some specific property. In this case, the decree falls short of that; because it only declares that there has been a private partition which does not carry the matter far enough, and in addition to that it professes to affect the rights of other parties who were not litigating those rights. The only thing the plaintiff was entitled to was a declaration with reference to his own property, and his own property according to his own case is some specific area within this mehal, not indicated by this decree.

The question then arises whether we can remand this case so as to enable the parties to get their rights tried. If we remanded the case we should have to remand it for fresh evidence to be taken, and for the case to be tried on different lines, and for a finding to be come to as to what specific pieces of land the plaintiff is entitled to under the alleged partition. That would not only involve the taking of fresh evidence and a fresh trial but also an amendment of the plaint. We do not think that any good purpose would be served by our adopting such a course, because all the costs which have been already incurred would be thrown away, and in fact it would be the same as if a fresh suit had been brought. Under these circumstances we think that the judgment of the District Judge dismissing the suit was right.

Our attention has been called to the case of *Khoobun* v. *Wooma Churn Singh* (1) as showing that such a suit as this can be maintained, although the specific land to which the plaintiff claimed to be entitled is not declared. But in that particular case the specific land does not seem to have been in dispute,

(1) 3 C. L. R., 453.